

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 2000 Session

MAELEA TSIA MORRISON GALYON, v. TED DANIEL GALYON

**Direct Appeal from the Sessions Court for Blount County
No. S-4694 Hon. William R. Brewer, Jr., Judge**

FILED SEPTEMBER 12, 2000

No. E1999-02594-COA-R3-CV

In this divorce action, the husband appeals the custody award of the minor child to the wife, and the distribution of marital property. We affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Sessions Court Affirmed.

HERSCHEL PICKENS FRANKS, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Martha Meares and Anne M. Stair, Maryville, Tennessee, for appellant, Ted Daniel Galyon.

Perry Paine and David M. Boyd, Maryville, Tennessee, for appellee, Mælea Tsia Morrison Galyon.

OPINION

In this divorce action, the parties were granted a divorce and the husband appeals from the award of custody of the minor child to the mother, and also appeals the allocation of the marital property.

The parties were married in 1992, and one child was born of the marriage, who was almost four years old at the time of the divorce hearing. After the trial, the Court issued a Memorandum Opinion granting the wife a divorce based upon the husband's inappropriate marital conduct, and awarded the wife custody of the child. The Court rejected the husband's wishes for an award of joint custody.

As to the marital property, the Court held that the wife had brought \$50,000.00-

\$60,000.00 into the marriage, which became marital property, but that the husband's inherited property was separate property. The court stated that it had considered all of the relevant statutes and had determined that an equitable division should favor the wife. The Court essentially divided the marital assets equally except for the marital home, awarding the wife 75% of the proceeds of the sale and 25% to the husband. Taking into account the overall award of marital assets, the wife was awarded approximately 60% of the marital estate, and the husband 40%, not taking into account his Air National Guard Pension.

On appeal, the husband first argues that the Trial Court should have awarded joint custody to the parties, or in the alternative, the husband should have expanded visitation with the child.

Our review of an initial custody determination is “*de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.” *Hass v. Knighton*, 676 S.W.2d 554 (Tenn. 1984). Custody decisions are factually based and often turn upon the credibility of the witnesses, and we are therefore hesitant to reverse the trial courts' decisions, because the trial judge is able to observe the witnesses' testimony and judge their credibility. *Adelsperger v. Adelsperger*, 970 S.W.2d 482 (Tenn. Ct. App. 1997).

It is well-settled in this jurisdiction that in custody cases, the “welfare and best interests of a child are of paramount concern.” *Koch v. Koch*, 874 S.W.2d 571 (Tenn. Ct. App. 1993). To determine what is in the best interests of the child, courts are instructed to consider numerous factors, set forth in Tenn. Code Ann. §36-6-106.

The courts are also instructed to apply the doctrine of comparative fitness, such that neither party must be deemed unfit, but rather the two possible custodians should be compared and a judgment made regarding who is more fit. *Koch*.

In this case, the Trial Court considered the testimony offered and concluded that it was in the child's best interest to reside with the mother, stating the evidence in support of the mother having sole custody was “overwhelming”. The evidence does not preponderate against the Trial Court's decision. Tenn.R.App.P. Rule 13(d).

The husband insists, however, that the parties should have been awarded joint custody, rather than the wife having sole custody. However, joint custody is not awarded where the parties are not in agreement, and have demonstrated a lack of cooperation, as in this case. *See* Tenn. Code Ann. §36-6-101(a)(2); *Jahn v. Jahn*, 932 S.W.2d 939, 942 (Tenn. Ct. App.1996); *Brumit v. Brumit*, 948 S.W.2d 739 (Tenn. Ct. App. 1997). The statute also instructs that the trial judge has the “widest discretion to order a custody arrangement that is in the best interest of the child.” Tenn. Code Ann. §36-6-101(a)(2). The Trial Court considered the husband's request, but found that this was not a proper case for joint custody, and the evidence supports this determination.

Finally on this issue, the husband argues he should have been given more than standard visitation with the child. The Trial Court awarded “standard” visitation plus any other visitation which the parties could agree upon. Trial Courts exercise broad discretion over custody and visitation, and we are reluctant to second-guess the Trial Court’s decision on these issues. *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996). We affirm the judgment of the Trial Court on this issue.

Next, the husband argues that the Trial Court erred in its division of the parties’ marital property because an “arbitrary percentage formula” was used in an “inconsistent manner.” In this jurisdiction, a trial judge’s division of marital property must be equitable, taking into consideration the factors set forth in Tenn. Code. Ann. §34-4-121(c). Our review of the Court’s property evaluation and distribution is *de novo* with a presumption of correctness, unless the evidence preponderates otherwise. Tenn.R.App.P. Rule 13(d); *Mondelli v. Howard*, 780 S.W.2d 769 (Tenn. Ct. App. 1989). The trial court has broad discretion in these matters, and its decision is given great weight on appeal. *Mondelli*.

The Trial Court essentially accepted the wife’s proposed distribution, and under those evaluations, the wife received \$46,000.00 worth of property and the husband received \$44,000.00, plus the division of the proceeds of the house, in the 75%/25% split.

The only evidence presented regarding the evaluation of the assets was the testimony of the parties, and the wife’s opinion of the value of the property awarded to her, not including the marital residence, was \$46,000.00. The husband’s evaluation of the property awarded to the wife was approximately \$7,000.00 higher (\$53,000.00). The wife’s evaluation of the property awarded to husband, (not including the marital residence proceeds or the husband’s Air Guard pension) was \$44,000.00, and the husband valued these same assets at approximately \$33,000.00.

The court was free to assign any value within the range of values shown by the evidence. The Trial Judge who is the primary judge of the witness’s credibility, accepted opinions of the values offered by the wife. The evidence does not preponderate against the Trial Judge’s findings as to these assets. Tenn.R.App.P. 13(d).

Finally, husband argues that the Trial Court erred in the division of the proceeds of the marital residence. The wife counters that the Trial Court was correct in awarding her a greater portion of the marital estate because she brought a much greater monetary contribution into the marriage from the beginning. In this regard, we have previously held that such monetary contributions are to be considered when making an equitable division, as mandated by Tenn.Code.Ann. §36-4-121(c)(5). The evidence shows that the wife brought a home with \$5,000.00 in equity, a car and \$50,000.00 in cash into the marriage. The husband, by contrast, brought a car and \$5,000.00 into the marriage. After the parties were married, the wife sold her home and paid \$30,000.00 down on the home which was titled in both parties’ names. The wife

also paid \$12,500.00 out of her separate money to buy husband's truck.¹ Subsequently, the husband received an inheritance and placed \$6,000.00 of his inheritance into a joint account to which the parties continued to make contributions. The wife had also put \$7,500.00 separate money in a joint savings account, which the husband withdrew when the parties separated, and used primarily to pay his litigation expenses. We conclude that the evidence does not preponderate against the Trial Judge's allocation of marital property, and we affirm his judgment as being equitable.

The cost of the appeal is assessed to the appellant, Ted Daniel Galyon.

HERSCHEL PICKENS FRANKS, J.

¹The husband also argues that the truck should be considered his separate property because wife wrote "Happy Anniversary" on the check, but the court clearly disagreed and included both the truck and wife's van (which she claimed was a Christmas present) as part of the parties' marital estate.